be liable upon conviction before a Magistrate to a fine not exceeding five hundred dollars."

Now I think it is clear that no one but a licensee can be convicted under this sub-section. It is obviously not possible for the Licensing Officer to create an offence against a stranger by a condition endorsed on a licence to which he is not a party. The view of the Magistrate, therefore, that the musicians could be prosecuted and the defendant charged with abetting them is incorrect. No one but Ponnampalam could be convicted of the offence charged. If he is to be convicted, therefore, he must be convicted for the act of the musicians. Ponnampalam was not there.

In *Halsbury's* Laws of England, Edition 2, Vol. IX, page 13 the law is stated as follows:—

> "In the limited class of cases where a particular interest or state of mind is not of the essence of the offence, the acts or defaults of a servant or agent in the ordinary course of his employment may make the master or principal criminally liable, although he was not aware of such acts or defaults, and even where they were against his orders."

Now I think that it is inconsistent with the scheme of the Enactment and also with common sense to assume that the Legislature intended that the licensee should be responsible only for a breach committed by himself, and not by his servants; otherwise he might stand mute among a large brass orchestra and defy the licensing officer, or stand by while his doorkeepers admitted a prohibited number of people to the auditorium.

In *The Attorney General* v. *Siddons*, 1 C. & J. 220: 140 E.R. 1400, the absent master was convicted because his servant concealed smuggled goods in the conduct of the master's business.

Alexander, L.C.B. said:—

> "Now it appears to me that.....
> .....whatever a servant does in the course of the employment with which he is entrusted, and as a part of it, is the master's act. The legal presumption is so, unless the contrary be shewn. It is the presumption that the master authorised it.
>
> This is admitted to be true, as far as civil liability goes; but it is argued that it is not true as to criminal or penal consequences. How far this rule may be entered in criminal proceedings, I will not upon this occasion presume to say, but, to a certain extent, it unquestionably has been applied to criminal proceedings.....
> .....It is not necessary for me, however, upon the present occasion and for the present purpose, to say how far this principle might extend, for I think it quite clear that it extends to this case. The provisions of the legislature would be inefficacious if the master for whose benefit the operation is intended, were to escape these penalties which the legislature has imposed, where the act was done in pursuance of the general purpose which the servant was undoubtedly authorised by the master to carry into effect. It is evident that all these provisions would, but for this construction be unavailing."

This reasoning in my opinion is appropriate to our case and I think therefore the Magistrate's view was erroneous, and that Ponnampalam ought to have been convicted.

[The judgment here proceeds to deal with the question of the form and service of the summons—Editor].

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

THOMAS, C.J.

May 18, 1934.

PUBLIC TRUSTEE, FEDERATED MALAY STATES..... .....Plaintiff.

vs.

W. GERMAN.....Defendant

[SELANGOR ORIGINATING SUMMONS No. 45 of 1934]

Probate & Administration Enactment, 1920, Ss. 70, 74; Rule 29 made under S. 74 (i) & (ii), Courts Enactment—Will—Attestation—Attesting witness an interested party—Validity.

In the Federated Malay States a Will is valid notwithstanding that one of the attesting witnesses is interested as a legatee or otherwise takes benefit thereunder.

Rule 29 of the Rules made under Sec. 77 (i), (ii) of the Courts Enactment (Gazette Notification No. 2179 of 1916) is *ultra vires* in so far as it relates to the admissibility of the evidence of an attesting witness, who is a legatee, or imposes any condition on such attesting witness.

Yong Shook Lin for the plaintiff.

E. A. S. Wagner for the defendant.

The facts appear sufficiently from the judgment below.

Cur. Ad. Vult.

THOMAS, C.J.—Mr. Samuel Scott, who will be subsequently referred to as the testator, made a will dated the 13th of April, 1933. This will is very short, and so may be set out in full.

> "I will and bequeath to W. German, Kuala Lumpur, the sum of dollars three thousand, if he is still alive at the time of my decease.
>
> My estate to be looked after by the Public Trustee as my executor. Fifty pounds sterling to Miss Risdon. Fifty

pounds sterling to Dr. Braddon of Mount Beryh Estate, Negri Sembilan. Residue of the estate to be given to General Gordons School in England.

Dated the thirteenth day of April nineteen hundred and thirty three.

Sd: Samuel Scott.

Witness:

Sd: W. German,
Government Offices,
Kuala Lumpur.

Sd: Ardern."

A petition under section 70 of the Probate and Administration Enactment, 1920, for probate was presented by the Public Trustee and filed on the 1st of June, 1933. That petition stated that the will was duly executed on the 13th of April, 1933, and that the petitioner was the executor named in the will. Attached to the petition is a declaration sworn by E. Ardern, on the 31st of May, 1933 as follows:—

> " I, E. Ardern, one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature thereto in the presence of myself this declarant and in the presence of W. German the other attesting witness thereto all these being present at the same time, and that I and the said W. German subscribed our names as witnesses in the presence of the deceased and of each other."

On the 24th of June probate was granted to the Public Trustee. The grant of probate states that " on the 19th day of June, 1933, the last will (a copy of which is hereunto annexed) of Samuel Scott, late of Kuala Lumpur and Seremban, deceased, who died on the 14th day of April, 1933, was proved before me."

It is clear that the evidence proving the will consisted of the declaration which has been set out previously.

The Public Trustee has now taken out an originating summons, and asks for the determination of the following questions—

1. The validity of the bequest to W. German, Kuala Lumpur of the sum of $3,000/- in the last will and testament of the said deceased.
2. Alternatively, the validity of the attestation of W. German, Government Offices, Kuala Lumpur, one of the attesting witnesses to the said will.

A further question has arisen in the course of the hearing of the Originating Summons, viz. as to the identity of the Gordon Boys School. It seems to have been assumed that the words " Gordon Boys School " used by the testator referred to an institution which is called the Gordon Boys Home.

An affidavit has been sworn on the 6th of April, 1934, by Henry Carden Herbert the Commandant of the Gordon Boys Home. It appears from that affidavit that there is a Gordon Boys Orphanage and Home at Dover in the County of Kent with objects somewhat similar to those of the Home. The Commandant has also taken steps to discover whether any other similar institution exists.

These matters are not properly before the Court, and it would seem to me to be advisable for the Public Trustee to take the steps usually taken in such matters by advertisement or otherwise, to enable any possible claimant to appear. He should also make a specific application for instructions in the matter, and for the payment out in due course of the legacy. The Court will afford the Public Trustee every assistance, but cannot give advice as to what steps should be taken.

To revert to the matter now before the Court. Section 12 of the Probate and Administration Enactment provides that—

> " Probate of a will, when granted, establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such."

Section 63 of the same Enactment provides for the revocation of a grant being made for just cause. Needless to say that until an application for revocation has been made and granted the probate which has been granted must be recognised by the Court.

A will is admissible to probate if it is made in accordance with the law of the country in which it is made or in accordance with the law of the domicile of the testator. For reasons which will subsequently appear, it is not necessary to go into question of the nature of the property disposed of by the will.

The question then arises, whether the will of the testator is valid either in accordance with the English law or with the law of the Federated Malay States. By section 9 of the Wills Act, 1837,

> " No will shall be valid unless it shall be in writing and executed in manner here-

inafter mentioned (that is to say) it shall be signed at the foot or end thereof by the testator.....and such signature shall be made.....in the presence of two or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary."

Section 15 of the Wills Act, 1837, is as follows:—

"If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy..... shall be thereby given or made, such devise, legacy.....shall so far as concerns such person attesting execution of such will, or the wife or husband..... be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will..... notwithstanding such devise, legacy..... mentioned in such will."

Therefore, if this will has been made in accordance with English law, there can be no doubt that it has been properly executed; but also there can be no doubt that the legacy to W. German would be void.

It has however, been urged that the testator had acquired a domicile in the Federated Malay States. From the evidence placed before me, I am prepared to accept that such was the case. I, therefore, conclude that this will would have to be made in accordance with the law of the Federated Malay States.

A will is defined in the Probate and Administration Enactment as

"the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death."

Section 70 of the Probate and Administration Enactment provides that on an application for probate there shall be a petition stating amongst other matters that it was duly executed; and section 74 provides that the petition shall be verified by at least one of the witnesses to the will (when procurable) in the following manner or to the like effect

"I (C.D.) one of the witnesses of the last will and testament of the testator mentioned in the above petition declare that I was present and saw the said testator affix his signature thereto."

It might be arguable that by implication it was the intention of the Enactment that a will should be attested by more than one witness. On the other hand the Enactment does not specifically say so, and the section might well mean that when there are witnesses, one at least of such witnesses shall make a declaration.

In the former event there are in fact two witnesses to this will; in the latter event the will could be proved under section 72 of the Evidence Ordinance, which provides that

"an attested document not required by law to be attested may be proved as if it were unattested."

In dealing with a document for which no attestation is required by law, the Court will have to be satisfied as to the genuineness of the document, and will treat with grave suspicion any proof of the document dependent upon the evidence of an interested witness.

Provision has been made under the Courts Enactment section 77(i) that the Judges appointed under the Enactment or any two of them, of whom the Chief Justice shall be one, may from time to time make rules not inconsistent with this Enactment or with any other law for the time being in force in the Federated Malay States for all or any of the following purposes:—

(*a*) for regulating the practice and procedure of all the Courts mentioned in section 4 (i).

Sub-section (ii) of the same section provides that—

"such rules, when approved by the Chief Secretary to Government, shall be published in the Gazette, and upon such publication shall have the same force as if they had been enacted as part of this Enactment."

This sub-section has been amended by Enactment 11 of 1934. Section 4(i) is as follows:—

"The Courts for the administration of civil and criminal law in the Federated Malay States shall be as follows:—

(*a*) The Supreme Court, comprising the Court of Appeal and Court of a Judge."

Rules were made and published in Gazette Notification No. 2179 of 1916. These are set out in volume 1 of *Allen* at pages 373-376. The object of the rules is to provide machinery for the working of an Enactment, and they must be made a means of originating legislation. In so far as any one of the rules now referred to has

the intention to legislate, then it is without question *ultra vires*.

Of these rules, rule 29 provides as follows:—

> "The circumstances of a person being named as an executor in the will..... or being interested as a legatee.....under such will.....renders him or her incompetent to become an attesting witness to it, so that if the name of a person so interested appears as that of a subscribing witness to the will.....the same, so far as regards his or her attestation, must be considered as unattested, and his or her evidence in support thereof will be inadmissible, unless he or she shall first release his or her interest thereunder."

In my opinion there is no power by rule to say what persons or classes of persons are capable of being witnesses or to impose conditions of any kind upon them. It is by no means clear that the Enactments of the Federated Malay States require any witness at all; they certainly do not impose any such conditions as are contained in this rule. If under a rule it was permissible to impose any such conditions, then what limit would there be to such conditions? It would be easy to state all sorts of conditions which might be imposed. I will only suggest one, viz. that no relative of the testator should be qualified to be an attesting witness.

Such matters are not, in my opinion within the province of the rule making authority but of the legislature. My attention has not been drawn to any Enactment and I have not been able to find any, containing clauses similar to those in the English Wills Act, which I have set out above, or in the Indian Succession Act sections 50 and 54. Needless to say that I should welcome an Enactment dealing with these matters so as to remove a state of affairs which, in my opinion, is at present unsatisfactory.

I come to the conclusion that rule 29 is *ultra vires* so far as it relates to the admissibility of the evidence of an attesting witness, who is a legatee or imposes any condition on such attesting witness. I purposely refrain from making any comments on these rules except to the extent that it is absolutely necessary for the determination of the principal question now before me.

It only remains for me to say that the answers to the questions raised by the Public Trustee are

(1) the bequest to W. German is valid;

(2) the attestation by W. German does not affect the validity of the will.

The costs of the Public Trustee and of Mr. W. German will come out of the estate. The attendance of any other parties at this stage would appear to be unnecessary, and therefore, they will have to pay their own costs.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]

THOMAS, C.J.

July 7, 1934.

ANG CHOON KOAY (AS TRUSTEE)..... Appellant.

CHAIRMAN SANITARY BOARD, KUALA LUMPUR.....Respondent.

[SELANGOR APPLICATION FOR EXECUTION No. 76 of 1933]

The Sanitary Boards Enactment, 1929, sections 45 and 50 — Priority of statutory charges thereunder over charges under The Land Code, 1926, Part X.

A rate is protected by a first charge on the land itself and in the last recourse it should be recovered by a sale of the land.

The words "subject to the provisions of the Land Code, 1926," in section 45 of the Sanitary Boards Enactment, 1929, do not make that first charge subject to any other charges created under Part X of the Land Code.

Summons in Chambers before Thomas, C. J.

E. A. S. Wagner for the appellant.

R. C. Cussen, Deputy Legal Adviser, for the respondent.

Cur. Ad. Vult.

THOMAS, C. J.—This is an appeal from the decision of the Registrar of the Supreme Court, Kuala Lumpur, ordering certain lands, the property of the appellant as trustee for a minor, to be sold free from the charge thereon.

The appellant is the chargor or the representative of the chargor in respect of a voluntary charge effected under the provisions of Part X of the Land Code. No particulars have been supplied as to the details of this charge and it would seem that they were not essential for the purpose of the Registrar's decision.

The ground of appeal is that as the statutory charge created by the Sanitary Boards Enactment, 1929, is subject to the provisions of the Land Code, any order for sale should have been subject to the voluntary charge and not free from that charge.